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# YALE LAW JOURNAL

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Vol. XXIV

APRIL, 1915

No. 6

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## THE NEW LEGAL JUSTICE \*

Criticising courts and lawyers and the law is one of the popular pastimes of the day. Surely all the discontent with the administration of justice is not without some foundation, and it behooves all who are interested in social progress to examine critically our legal system in order to discover its defects and remedy them. Within the limits of an article such as this, it is possible to take up only one phase of the legal situation, but the one that is here discussed is, perhaps, the most fundamental of all.

Courts of law exist to give justice, but of course the question immediately suggests itself, What is justice? Obviously, the definition which the legal profession gives to the word is most important. The history of jurisprudence shows that there have been three conceptions of justice in the past, and that now we are shifting to a new one.

In order to appreciate the first conception of legal justice that we find in both the Roman and the Anglo-Saxon law, it is necessary to realize the condition of the societies out of which it arose. Nowhere was there order or a central power. The family group was the unit. There were no courts. If a man were injured, his recourse was to take personal revenge upon his assailant. If the injured person were unable to help him-

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\* Much of the material for this paper has come from the writings of Professor Roscoe Pound, of the Harvard Law School, and from notes of his lectures. It would not be practicable to specify each point for which I am indebted to him, so this wholesale acknowledgment is made in advance.

self, he appealed to the head of his family and then the force of that unit was used to secure vengeance from the aggressor or his kinsmen. Self-help was about the only method of redressing wrongs. Of course this led to the rule of physical giants. Physical strength was the means by which men protected their persons and their acquisitions, and naturally those who were stronger could not only protect their own interests, but they could take advantage of weaker persons with little fear of having to suffer for their wrongs.

When some notion of orderly government began to emerge from these primitive conditions, and the first courts were established, their original function was merely to check private warfare by providing a substitute for personal vengeance sufficiently attractive and satisfying to be accepted by the injured party. Hence, in measuring the amount of relief to be given, the primitive law sought to determine what payment by the aggressor would be sufficient to satisfy the injured party's desire for revenge. The court did not attempt to say how much the plaintiff was out of pocket, but treated the whole matter under the head of insult and ordered the defendant to buy off the plaintiff's thirst for vengeance. Such was the case in the early Roman law. A curious example of this principle is furnished by the early law of the Franks, known as the Salic law, which allowed twice as much to a Frank for a given injury as was awarded to a Roman for the same injury. The Frank had been accustomed to right his own wrongs, while the Roman had been trained for centuries to settle his controversies in courts, and hence it took twice as much to appease the Frank's desire for vengeance. In the earliest Anglo-Saxon law we find that double payment was required for a wound which was not covered by the clothing, since this would subject the party to the ridicule of all who saw him and thus increase his thirst for revenge.

Of course the Greeks and the Romans quickly outgrew so crude a notion of justice, and developed a new one in its stead. With the development of their civilizations, law had become an important institution and something more than merely a means of suppressing private warfare. Society had grown more complex and the social relations of men made heavier demands on the law. Law must not only provide redress for wrongs; it must define the relations and duties of individuals in the social scheme. The philosophy of both Plato and Aristotle argued for a social order in which every man moved in an appointed groove. In the

*Republic* Plato says: "And the shoemaker was not allowed to be a husbandman, or a weaver, or a builder—in order that we might have our shoes well made; but to him and to every other worker one work was assigned by us for which he was fitted by nature, and he was to continue working all his life long at that and at no other."<sup>1</sup> "And this is the reason why in this State, and in this State only, we shall find a shoemaker to be a shoemaker and not a pilot also, and a husbandman to be a husbandman and not a dicast also, and a soldier a soldier and not a trader also, and the same of all the other citizens."<sup>2</sup> Thus it seems that Plato would have the whole force of the state used to compel a man to keep in the groove to which he was appointed. Aristotle further developed this idea. To him it was possible for rights to exist only between those who were free and equal. He says in his *Nicomachean Ethics*: "Justice will involve an equality between the persons concerned therein identical with the equality between the things; for, as is the ratio of the things to one another, so too must be the ratio of the persons. If the persons be in the ratio of inequality, then their shares must be in the same ratio."<sup>3</sup> It is interesting to note in this connection the numerous Biblical passages which express the same ideas. Saint Paul in his letters, but particularly in the one to the Ephesians, exhorts men to do their duty in the class in which they find themselves placed.

Cicero was responsible for the injection of the ideas of these Greek philosophers into the Roman law. In his writings he made accessible to his generation the traditional philosophy of Greece and adapted it to the conditions of the Roman law. Cicero declared that justice consisted in the making of certain sacrifices by the individual for the communal interests, such as offending no one, living honestly, and rendering unto each his own.<sup>4</sup> Later we find these enumerated as precepts in the *Institutes* of Justinian.<sup>5</sup> But how was a person to know what was another's own? The Roman Law answered this question by regarding each individual as "subject" to a variety of legal duties which flowed from his status. Each person was born into a status—noble, citizen, freeman, slave—and all his relations with other men were determined by his status. The law sought to keep

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<sup>1</sup> Jowett, *Dialogues of Plato*, Vol. II, 196.

<sup>2</sup> Jowett, *Dialogues of Plato*, Vol. II, 221.

<sup>3</sup> Aristotle, *Nicomachean Ethics*, Bk. V, Ch. III.

<sup>4</sup> Berolzheimer, *The World's Legal Philosophies*, 87.

<sup>5</sup> *Institutes of Justinian*, I, 3.

everyone in his appointed groove—to preserve the *status quo*—and whatever would do this was regarded as just. Thus we find the second definite conception of justice to be the definition of the relations and duties between individuals in an orderly society with the object of preserving the *status quo*.

The Middle Ages added nothing to juristic philosophy, except to exhibit occasionally the smouldering flames of the later theories of natural law. All through this period no one questioned the Roman notion that the end of law was the preservation of the *status quo*. That doctrine was enforced by the unassailable authority of more than one text of Scripture and hence had the sanction and support of the Church at Rome. Moreover, the economic conditions of Europe during that period and in England after the Conquest, were conducive to a general acceptance of such a notion of law. Commerce was almost unknown, and the little that did exist was largely in the hands of the Jews. The towns were organized bodies, divided into groups of minor organizations known as guilds, which resembled our modern trade unions. Each guild was composed of the artisans of a certain class. A man had influence or position only within his guild; outside of it he had no standing whatever. A juristic science that would keep each artisan in his appointed place fitted well with the traditions of such organizations. Outside the towns, the feudal system was equally well adapted to the growth of such notions. Hence, the Roman law's conception of justice went unchallenged until the Reformation, at which time we find a shifting to a new standard.

The Reformation began as a revolt against the domination of Rome, but its cultural effect was the vitalization of individual freedom. The distinctive feature of the Middle Ages may be said to have been the social, religious and legal bondage of the individual, in contrast to the emancipation of the individual which characterizes the Reformation. The Roman authority in religion and law had long held back Teutonic individualism, but when once the floodgates were opened, it spread all over Europe. However, the first jurists of the Reformation did little for juristic theory, since they were chiefly concerned with overthrowing the domination of the Church. This, they accomplished by a new conception of religion which sought to put men in direct touch with God without an intermediary in the form of priest or pope. Having broken the power of the Church, they then endeavored to establish the authority of the state.

While the Protestant Reformers were attacking the authority of the Church, the Catholics were defending it. Particularly was this true of the Spanish theological-jurists, of whom Suarez was the most prominent.<sup>6</sup> This Spanish school of thinkers developed the idea that law was not an enactment of a temporal power, but was an eternal truth. They recognized the existence of man-made laws, but they regarded these as valid only in so far as they conformed to the natural law. This natural law, they maintained, had its source in God the Creator, and was implanted in the souls of human beings to enable them to distinguish right from wrong. A civil statute that contravened the dictates of the natural law was *ipso facto* void, according to them, for in the hierarchy of laws the precepts of nature are higher, both in source and effect, than those of any merely human agency. Thus there developed the notion that the natural law consisted of a universal and eternal body of law which placed impassable limits on man-made laws. Hence, the action of one state toward another state, or of a state toward an individual, or of one individual toward another individual was only valid when such action conformed to the natural law.

In 1625 the great work of Grotius appeared, and it marked a new epoch. He adopted much of the reasoning of his Catholic precursors in Spain, which had been little received in Northern Europe because of the unpopularity at that time of anything of Catholic origin. But when the same ideas emanated from a Protestant, they were given due recognition. Grotius asserted the existence of a natural law which limited the activities of both states and individuals, but he contended that the source of the natural law was not in Divine law, but in reason. For Grotius and his followers, reason was the measure of all obligations.<sup>7</sup> They refused to accept the authority of the Roman law merely as authority, but they did recognize much of it as the embodiment of reason. Hence they adopted, as conforming to reason, the precepts of the Roman law—to offend no one, to live honestly, and to render unto every man his due. But obvious difficulties were thus raised: What is an offense to another, and what is the standard by which another man's due shall be determined? Grotius and his successors answer these questions with a theory of natural rights, based on a recognition of certain qualities

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<sup>6</sup> Dunning, *Political Theories from Luther to Montesquieu*, 132-149.

<sup>7</sup> Grotius, I, 1, 3, Sec. 1.

inherent in all persons, regardless of class or status, which were demonstrated by reason and which therefore ought to be made effective by the natural law. This conception was finally developed into pure individualism.

From the beginning of the seventeenth century until recent times, the philosophy of individualism has dominated all of the sciences, particularly politics, theology, philosophy and law. The individual was the center of this doctrine, and the state was regarded merely as the creation of men to serve for the social purposes of protection from foreign invasion and preventing the physical interference with one man by another. The only progress that seemed possible to these philosophers was in the development of individuals into physical, moral or intellectual giants and the elimination of the unfit when they have demonstrated their incapacity to hold their own in the struggle for existence. Everyone was to be free to develop or prostitute his powers as he saw fit. Self-interest was to be the force which would move men to exert their best energies and develop their capacities to the utmost. If self-interest did not do this, the state was not to interfere. Indeed, the state could not. These natural law philosophers maintained that rights and obligations existed in a "state of nature"—a state in which each individual was free to do as he pleased; but that upon becoming a member of society, the individual surrendered to the state his right to absolute freedom in so far as that must be limited to protect other men from his violence. But the individual gave up no more than this, and the state was powerless to interfere in any other way. According to these philosophers, the game of life was to be played in a way that would not violate another man's physical integrity, but except for this the contest was to be a free-for-all fight to the bitter end and a survival of the fittest.

When the individualistic philosophy was adopted into jurisprudence, the watchword of the law became "liberty." Each contest was decided by treating the litigants as absolutely free and equal beings. The courts endeavored to give the utmost effect to the individual's liberty, imposing no restrictions except those necessary for the protection of the equal liberty of others. This caused an insistence to be placed upon the inviolability of private property and of contracts. The state was to protect a man's property from disturbance by others, and so sacred did the individual's right to his property come to be regarded that the state itself was not allowed to interfere with it, even in the

interests of the public good. To quote from Blackstone: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . Nor is this the only instance in which the law of the land postponed even public necessity to the sacred and inviolable rights of private property."<sup>8</sup> And this idea is still deeply rooted in our legal conceptions. For example, when the Income Tax Cases were before the United States Supreme Court in 1896, Mr. Joseph H. Choate, in his argument as counsel, said: "I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger."<sup>9</sup>

Along with the inviolability of private property, our courts have maintained the sacredness of the liberty of contract. The law has numbered among the individual's "natural rights" the right to call upon the law to enforce the contracts he has made, and to protect his freedom in making other agreements. The words of Professor John C. Gray, of Harvard, in the preface to the second edition of his *Restraints on Alienation*, show the juristic attitude toward this. He says: "The foundation of the [nineteenth century] system of law and morals was justice, the idea of human equality and human liberty. Every one was free to make such agreements as he thought fit with his fellow creatures, no one could oblige any man to make an agreement that he did not wish, but if a man made an agreement, the whole force of the state was brought to bear to compel its performance."

The English common law adopted the individualistic conception of justice early in the seventeenth century. Prior to that time, especially under the Tudors, the political power of England had become centered in the Crown. When James I came to the throne he was imbued with the notion of the divine right of kings to rule absolutely. As part of a systematic scheme to put this idea into effect, James endeavored to judge cases whenever he pleased "in his own person, free from all risk of prohibition or appeal."<sup>10</sup> In attempting this, James found

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<sup>8</sup> Blackstone, Commentaries, Vol. I, 139.

<sup>9</sup> *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 429, 535.

<sup>10</sup> Campbell, Lives of the Chief Justices, 269.

a most formidable antagonist in Sir Edward Coke, then Chief Justice of the Common Pleas. Coke resisted all attempts to extend the royal prerogative, and he supported his contentions by "natural rights" arguments. Coke maintained that the individual Englishman had rights which no government or king could violate, and that these rights were protected by the common law. From the time of James I until the beginning of the nineteenth century the contest between the Crown and the courts continued, and during all of this time the courts insisted upon the fact that the individual had rights which the government must respect. The English common law was the protector of the common man from the arbitrary action of his government. Hence, it is not surprising to find the early American colonists praising the common law as one of their sacred heritages; nor was it idle praise.

Coke was the inspiration of the lawyers who followed him, and they used his reasoning in resisting further encroachments of the Crown upon the liberties of the people. For instance, in Blackstone we find the following: "In vain it may be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or any public tribunal to be the judge of this common good and decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private property."<sup>11</sup>

Moreover, while natural rights reasoning was peculiarly adaptable to the political conditions from 1600 to 1800, the economic conditions also were ideal for the development of individualistic notions. The old mediæval manors generally were broken up and small farming and sheep-raising were the chief agricultural pursuits of the rural population. The domestic system of manufacture was the basis of the industrial organization of the period, and commerce was carried on chiefly by small merchants. It was a time of economic democracy. Speaking generally, all men were economic equals; workman and employer lived in daily contact with each other, and every man met his competitors on an equal basis. The only dangerous enemy that the common man had was his government, and the common law protected him from that. In America, until recently, both the political and economic conditions have been conducive to the preservation and

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<sup>11</sup> Blackstone, *Commentaries*, Vol. I, 139.

development of individualism as the basis of our law. The colonies separated from England to escape the tyranny of the British crown, and this caused the founders of our governments to place all possible restrictions on governmental interference with individual liberty. Our bills of rights and other constitutional checks are examples of this. In the matter of commercial relations, America was most democratic until within the last half century. Except during the past few years, the whole trend of the political and economic thought of America has been toward individualism. The American lawyer was taught individualism by his college professors of economics and philosophy, and the whole of his general and professional reading would add emphasis to these views. It is not merely natural to find the American lawyer an individualist;—it would be unnatural if we found him anything else. These men have been taught from all sources that the function of law was to protect men from interference by the government, that the end of law was the liberty of the individual and that the law would permit no government to violate that liberty. The courts in holding unconstitutional recent social legislation have applied this reasoning. The laws they set aside did deprive individuals of their liberty and hence, according to individualistic legal reasoning, did violate our constitutions.

But does this individualistic reasoning answer the needs of modern economic conditions? Most social scientists are emphatic in saying that it does not. To quote Mr. Ward, the eminent sociologist: "Much of the discussion about 'equal rights' is utterly hollow. All the ado made over the system of contract is surcharged with fallacy."<sup>12</sup> Every one who is acquainted with the actual conditions in our modern economic organization knows that this statement of Mr. Ward is true. For many years all men have been on a legal and political equality, but they have not been economic equals. The growth of the factory system during the nineteenth century completely changed the economic situation from what it was before. To-day capital is concentrated in a few hands. It has been asserted that more than one-half of the wealth of the United States is owned by less than one per cent. of the population. In the sixteenth and seventeenth centuries, the employer and employee worked side by side. To-day, business is conducted mainly by gigantic corporations, and the employee deals with his employer at long range. Generally, corporations

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<sup>12</sup> Ward, *Applied Sociology*, 281.

are soulless creations of the law, interested only in the size of dividends and insensible to the needs and conditions of the workmen. It is foolish to assert that a workman in dealing with such a concern is on an equality with it. Theoretically, both the workman and the corporation are equal legal units, and, in this matter, equal in their capacities and powers. But as a matter of fact, we know that the vast majority of the workmen in modern industry are economic slaves, except in so far as their conditions have been ameliorated by trade unions and an enlightened public opinion. When the modern employer is negotiating for the purchase of labor-power, he can wait until the workmen are willing to accept the terms he wishes to offer, since he can live off his hoarded wealth during the time that the strike of the laborers stops his income. But not so with them. The workmen cannot wait. Most of them must have work immediately or they will starve, and with them, those dependent upon them for sustenance. The fact that the class of working men is so numerous causes intense competition among them for available places. Hence, from his economic power to wait and because of the competition among the laborers, the employer can force his own terms upon his workmen.

For years philosophers, economists and sociologists have been calling attention to this economic inequality and have insisted that an individualistic philosophy was inadequate for the needs of modern conditions. Individualism was embodied into our law during a period of economic democracy. It was designed to protect the lives and liberties and property of men from arbitrary interference by a tyrannous oligarchic government. But to-day the situation is reversed. We have a democratic government and a tyrannous economic oligarchy.<sup>13</sup> To-day, legislatures attempt to protect men from the outrages of this economic oligarchy, but these efforts have been blocked. The shield which the common law set up to defend men from the arbitrary action by the government, is now invoked to shield the economic oligarchy from regulation by the government in the interests of society. Common law individualism, created for the protection of the people, has become the instrument of their oppression.

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<sup>13</sup> The thought here expressed has been taken from a most valuable and interesting paper by Professor Overstreet, entitled *Philosophy and our Legal Situation*, *Journal of Philosophy, Psychology and Scientific Methods*, X, 113.

All sorts of cures have been proposed for this situation, the more important ones being the recall of judges and judicial decisions. These remedies deal only with the machinery of the law and not with its substance. The recall of judicial decisions means that suits will no longer be tried by law, but without law; that litigation will no longer be decided with reference to established rules of jurisprudence, but according to the passing whims of a majority of the voters. Nor will the recall of judges do any good. Many of the decisions which cause judicial critics such pain must continue to be rendered until legislatures change the laws or the people change their constitutions. Moreover, when a judge is recalled, another will be put in his place whose conclusions will be practically the same as those of the recalled judge so long as the legal profession clings to its individualistic reasoning. As Professor Pound has said, it is not so much the recall of judges or decisions that we need, but the recall of our juristic thinking.<sup>14</sup>

Some years ago the other social sciences deserted individualistic reasoning and have been endeavoring to establish a social philosophy more in accordance with the needs of the present age. Up to this time these efforts have not been wholly successful, but a promising beginning has been made. Professors Dewey and Tufts in their *Ethics* summarize this movement in the following passage: "The old justice in the economic field consisted in securing to each individual his rights in property and contracts. The new justice must consider how it can secure for each individual a standard of living and such a share in the values of civilization as shall make possible a full moral life. The old virtue allowed a man to act as an individual; the new virtue requires him to act in concerted effort if he is to achieve results. Individualistic theories cannot intercept collectivist facts."<sup>15</sup> Instead of making individual liberty the end of all social institutions, the new philosophy would have the satisfaction of human wants as its goal. Liberty alone does not mean happiness. Satisfaction of wants, not liberty, brings happiness. Of course, every human desire cannot be satisfied, but the ideal of the new philosophy is the satisfaction of the greatest possible number of wants. This idea can be put in no better words than those of William James, in *The Will to Believe*:

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<sup>14</sup> Pound, *Social Problems and the Courts*, Am. Jour. of Sociology, XVIII, 331, 339.

<sup>15</sup> Dewey and Tufts, *Ethics*, 496.

"Take any demand, however slight, which any creature, however weak may make. Ought it not for its own sake to be satisfied? If not, prove why not. The only possible kind of proof you could adduce would be the exhibition of another creature who should make another demand that ran the other way. . . . Any desire is imperative to the extent of its amount; it makes itself valid by the fact that it exists at all. Some desires, truly enough are small desires; they are put forward by insignificant persons and we customarily make light of the obligations which they bring. But the fact that such personal demands as these impose small obligations does not keep the largest obligations from being personal demands. . . . After all, in seeking for a universal principle, we are carried onward to the most universal principle—that *the essence of good is simply to satisfy demand*. . . . Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can*? The act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions."<sup>16</sup>

A corresponding development has gone on in legal science. This commenced when lawyers began to recognize the interests which are behind legal rights. There are three sorts of interests: individual, public and social. Individual interests are any desires which any person may have; but that interest or desire becomes a legal right only when the law enforces it. It may be my desire or interest to appropriate my neighbor's watch, but I have no legal right to do this. On the other hand, it is my desire or interest that no one shall appropriate my own watch, and I have a legal right to this, since the law will enforce that interest. Public interests are of two sorts: first, those interests which the state, as a juristic person, has in its own personality, as its honor or dignity, and in its substance or property; and secondly, the interests which the state has as the guardian of social interests. These social interests are the most important of the three.

While heretofore, the rights of individuals have been regarded as of the utmost importance, the new philosophy relegates them to a secondary position and puts all the emphasis on social interests. The interests or desires of the individual are to be pro-

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<sup>16</sup> James, *The Will to Believe*, 195.

tected by the state, and hence become rights, only when it is for the advantage of society that the individual be given this right. As one writer expresses it: "A right is a power of acting for his own ends,—for what he conceives to be his good,—secured to the individual by the community, on the supposition that its exercise contributes to the good of the community."<sup>17</sup> This doctrine will make possible the unfastening of the grip that the individualistic philosophy has on our law. No longer will a man be given an unlimited right to enforce his contracts. These will be upheld only when it is for the good of society that he should be allowed to enforce them.

At present, social interests are only imperfectly worked out by the social sciences. Professor Pound has named six different ones which are identified: (1) the social interest in general security, such as public safety, public health, peace and order, security of transactions and the security of acquisitions; (2) the social interest in general morals; (3) in the security of social institutions, as in preserving the institution of marriage and not granting a divorce even though both parties desire it; (4) in the use and conservation of natural media; (5) in the protection of defectives and dependents; and lastly, in the individual's moral and social life.<sup>18</sup>

The common law has long regarded social interests as of more importance than private rights, but only a few social interests were recognized until recently. Far back in the Year Books we see that any one who engaged in a public calling, such as carriage of goods or innkeeping, must serve all who applied. An element of monopoly was seen in these businesses, and since there was no competition to protect the public's interests, the coercive public service law was used to enforce the duties owed to the public. Again, at very early times we find the courts of equity holding void any contracts in which the mortgagor of property agreed not to redeem it. These courts realized the foolish bargains that an eager borrower would make, so they protected these men from themselves, just as modern social legislation seeks to do. For centuries, our courts have held illegal any contracts which restrained trade, thus seeking to secure to the public the benefits of competition. There is practically nothing

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<sup>17</sup> Green, *Principles of Political Obligations*, 207.

<sup>18</sup> Pound, *Social Problems and the Courts*, *Am. Jour. of Sociology*, XVIII, 331, 336.

in the Sherman Anti-Trust law which was not in the common law. The so-called "police power" which has sustained so much social legislation, was purely the creation of the early nineteenth century American courts to enable them to uphold laws which apparently violated our constitutions.

However, it must be admitted that our courts and legislatures made no substantial progress in recognizing social interests until recent times, or at least the recognition which they did receive was fragmentary and exceptional. It marked no pronounced movement or fundamental change. But now we find the new social philosophy beginning to receive a frank and conscious recognition in judicial thought. In order to protect social interests, our law-makers have put all sorts of limitations on the so-called natural rights of individuals and the courts are upholding this legislation. Various examples of this may be seen. Restrictions on the absolute use of property are prescribed by statutes which prevent cruelty to animals, which require that only fireproof buildings be constructed within specified areas of a municipality, and which forbid the erection of billboards on vacant lots. The freedom of contract also has been limited by legislation which regulated the hours and conditions of labor. The *ius disponendi* of property has been abridged by enactments which require the wife to join in the conveyance of the homestead even though it be the sole property of the husband, which require the wife to be a party to a mortgage of the household furniture, and that the wife give her written consent to an assignment of the husband's wages. Legislation also has put limits on the power of the creditor to collect from the debtor. Numerous statutes exempt from execution a large amount (sometimes \$600 worth) of a householder's property, the tools of a mechanic, the library of a professional man, the implements of a farmer, and in some instances sixty days' wages of a laborer. Workmen's Compensation and Employer's Liability Acts also exhibit the same tendency toward recognizing the social interest in the full moral life of the individual. Compulsory vaccination laws are to protect the social interest in public health and asexualization laws are to save society from generations of undesirable citizens.

While the legislatures have been passing legislation which the courts sustained, the courts themselves have recognized and protected social interests to a much greater extent than most social reformers realize. There are numerous instances in which the

courts, by themselves, have refused to allow an individual to enforce his rights when it was not for the good of society that he do so. In the spite-fence cases we see the courts restraining the right of the individual to put upon his land any kind of structures that he chooses. If he has a legitimate purpose of his own to serve, the courts do not interfere, but when his sole object is to construct a hideous fence to spite a neighbor, the courts will prevent such action. Cases dealing with percolating and surface waters show the same thing. The owner of land may make all reasonable use of these waters, but he will not be allowed to exhaust them merely to prevent a neighbor from using them. In insurance law, the present tendency of courts is to take out of the domain of contracts many of the clauses in the policy, particularly those dealing with warranties made by the insured, and to deal with the various rights and liabilities of the parties merely as incidents to the relation of insurer and insured. Courts have long held that the beneficiary of an insurance policy must have an insurable interest in the insured life or property. A strictly individualistic jurisprudence would not demand this, since the parties should be free to make any contracts they choose. But the requirement is clearly to protect a social interest. There is too much danger of harm to society when a person is put under a financial temptation to destroy property in which he has no pecuniary interest or a life that is not endeared to the beneficiary by some bond of blood or affection. A case was recently decided in which a man had insured the life of his mother-in-law and the court held that he had no insurable interest in her life, doubtless believing that he already was under enough temptation to destroy her without any pecuniary benefits being offered for such an act. Spendthrift trusts, almost wholly of judicial origin, allow property to be given to a man so that he may live on the income derived from it, but under the restriction that it shall not be liable for his debts. From an individualistic point of view this is vicious, but the decisions may be justified on the ground that it insures the beneficiary a full moral life by allowing him to be protected from himself. For the same reason, courts refuse to enforce contracts in which a householder has agreed not to claim his exemption if sued. Another sort of judicial recognition given social interests is seen in the decisions relating to wild animals and running water. The early courts regarded these as belonging to no one, but if an individual reduced them to possession, they became his property. To-day, wild animals

and running water are regarded as assets of society which will be protected by the state, as the guardian of social interests, and individuals are allowed to appropriate them only under such rules and regulations as the state may prescribe. But it is in cases which concern dependent members of the household that we find courts most clearly recognizing the social interests involved. To show the changed judicial attitude, the language of the House of Lords in a recent case is most instructive:

"Their Lordships have been pressed, as the Courts below were, with broad judicial statements of the father's power over his children . . . But they remarked during the argument, and they wish to remark again, that no one has stated or can state in other than elastic terms the grounds on which the Court should think fit to interfere [with the father's control]. There must be a sufficient amount of peril to the welfare of the children. But that sufficient amount can hardly be fixed for one age by the standard of another. Drunkenness, for instance, is looked upon now as a much graver social offence than was the case two or three generations ago, and its effect upon the welfare of the family must be judged accordingly. For many years the tendency of legislative action and judicial decision, as well as of general opinion has been . . . in family questions, to bring the marital duty of the husband and the welfare of the children into greater prominence; in both respects diminishing the powers accorded to the husband and father."<sup>19</sup>

But from these examples of the liberalizing tendencies in modern judicial reasoning, one must not infer that the old legal philosophy has yet surrendered to the new. The juristic thinking of today is still largely individualistic in its character. Natural rights reasoning remains strongly intrenched in the minds of American lawyers. A notable instance of this may be found in the opinion of the late Mr. Justice Harlan, in a case decided by the United States Supreme Court in 1908. Congress had declared it illegal for an interstate carrier to discharge an employee because he belonged to a labor union. In holding the law unconstitutional, the learned justice said:

"It is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person,

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<sup>19</sup> *Smart v. Smart*, (1892) A. C. 425, 431.

against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it . . . In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can justify in a free land."<sup>20</sup>

Of course this language of Mr. Justice Harlan is gall and wormwood to the protagonists of the recent theories in social philosophy, but it is none the less orthodox common law, sanctioned by centuries of individualistic legal reasoning. The reputation of Mr. Justice Harlan is so spotless that no one would venture to assert that when he made this decision he was dishonest or corrupt or the tool of a corporation; but if a judge of lesser magnitude had rendered a similar decision, he would not have escaped such charges. It is true that occasionally there is a corrupt judge, but in the main, the judicial hostility to social legislation is absolutely honest. When those judges received their educations in law, in economics, in sociology, in philosophy, all of those sciences taught that the end of all institutions was the preservation of individual liberty and that the purpose of the constitutional limits put upon our governments was to prevent the state or nation from interfering with the individual's liberty. Acting under these individualistic influences, our courts have conceived it to be their solemn duty to uphold constitutions which forbade governmental interference with the lives, liberties or property of men.

Many reformers are impatient with lawyers for not adopting more rapidly the new tendencies in social philosophy. But this is a thing which cannot be expected to happen in the twinkling of an eye. Men not only will not, but they cannot, discard all the premises of their professional reasoning and take up new ones upon an instant's notice. Critics sometimes do not seem to realize how fundamental and far-reaching is the effect of a change to a new conception of legal justice. The magnitude of such a movement can be appreciated when one remembers that in all the past history of jurisprudence there have been but three conceptions of justice and that only now are we shifting to a

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<sup>20</sup> *Adair v. United States*, 208 U. S. 161, 175.

new one. It took the philosophy of individualism several centuries to permeate the common law and its impress on our legal thinking is too deep to be obliterated in a night.

However, the greatest obstacle to the socialization of law is not so much the conservatism of the legal profession as it is the fact that we have no generally accepted social philosophy which can be substituted for individualism. It is not enough to tear down individualism. A workable philosophy must be built in its stead. Not only must lawyers be shown that individualistic premises will not lead to just results, but the profession must be furnished with new premises which will lead to just results. Moreover, it must be remembered that the duty of the judge in each case is to apply the law as he believes it to be and not as he would like to have it. While a fundamental change in social conceptions of justice will eventually find its way into the law without legislation, this is because law is, at bottom, the expression of the whole social conscience, and not because the law changes with the individual opinions of the judge. Hence, before the new social ideas can be incorporated fully into the law, society itself must be converted to them. Law is said to be the institution in which society seeks to embody its own moral ideas. The law can adopt a new ethical idea only when that idea has become fairly definite and has received the general assent of society. An individual deals with cases one by one and determines each by his own notions of right and wrong. But a judge is forced to deal with a great number of cases in a short time and necessarily he decides them by some artificial standard. This artificial standard must express the ethical ideas of the community; not the judge's personal views. Hence, it is not sufficient to convert the judges to the new ideas, but society itself must adopt them before they can be absorbed into the law.

At the present time the new social theories cannot be said to have received general assent. Our moral ideas are full of innumerable self-contradictions. For instance, most of us believe in the rights of private property—especially our own—and at the same time we realize the havoc that has come from the unlimited acceptance of that theory. Such inconsistencies are inevitable in a period of transition. In such a time the social ethics is a mixture of the two warring philosophies, and each one leaves its impression on the moral ideas of the community. But the law cannot follow such a hybrid code of ethics. To do so would involve the administration of justice in all sorts of embarrassing

inconsistencies. In the main, the law must adopt, as a whole, either one philosophy or the other; and until society itself accepts the new social theories, individualism must remain the predominant philosophy of law. As Mr. Justice Holmes said, in an address before the Harvard Law School Association in New York, February 15, 1913: "Law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action; while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field."

The conflict now is to see if individualism will continue to represent the ethical ideas of our time. Whatever changes are made in social morality will be embodied in the law. The fight is the intellectual struggle between individualism and the new social theories. The field of battle is society itself. The new ideas have captured a few outposts, and the law has adapted itself to the new situation thereby created. But the main battle is yet to come, and whether the law shall continue to express the philosophy of individualism or adopt the new notions depends upon the result of this battle. The work of the lawyer is to adjust legal machinery to any change that may come in social morality, but his place is not to lead in the struggle for the change. Forward looking men must find their leaders for this struggle among the economists, the sociologists, the philosophers. Society looks to them for leadership in the fight for an economic democracy which will be a fit companion for our political democracy. Never before has so fascinating a task been presented to social philosophers. They must guide the progressive forces of civilization in this upward movement, they must take the scattered forces in our social order, reconcile the essential contradictions in our moral ideas, and out of the sorry confusion create an adequate and inclusive social theory which will be accepted by society as a fitting expression of its ideal for better things.

OSCAR ROSS EWING.

INDIANAPOLIS, IND.